

In the Matter of the Compensation of  
**JOSEPH A. CLARK, Claimant**  
WCB Case No. 14-04400  
**ORDER ON REMAND**  
Julene M Quinn LLC, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ogawa and Ousey.

This matter is before the Board on remand from the Court of Appeals.<sup>1</sup> Pursuant to its December 6, 2022, order, the court reversed the Board's prior order, *Joseph A. Clark*, 68 Van Natta 174 (2016), which affirmed an Administrative Law Judge's (ALJ's) order that affirmed an Order on Reconsideration that awarded 5 percent whole person permanent impairment for claimant's accepted low back conditions. Citing *Caren v. Providence Health Sys. Or.*, 365 Or 466 (2019), *Robinette v. SAIF*, 369 Or 767 (2022), and *Johnson v. SAIF*, 369 Or 579 (2022), the court remanded to the Board for reconsideration. Consistent with the court's directive, we proceed with our review.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

In February 2007, claimant compensably injured his low back. (Exs. 3, 4). Later that month, the SAIF Corporation accepted a lumbar strain. (Ex. 4-1).

In November 2011, Dr. Upshaw noted left lower back pain and lumbar radiculopathy. (Ex. 5-2). That same month, an MRI report documented an L5-S1 disc bulge and left paracentral disc extrusion. (Ex. 6-1).

In July 2013, SAIF accepted an L5-S1 disc herniation. (Ex. 16-1).

In April 2014, a Notice of Closure awarded 2 percent whole person permanent impairment. (Ex. 21). In May 2014, claimant requested reconsideration and a medical arbiter examination. (Ex. 25).

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<sup>1</sup> Members Johnson and Weddell participated in the Board's prior review. Because they are no longer with the Board, Members Ogawa and Ousey have participated in this review.

In July 2014, Dr. Kane, an osteopathic medicine physician, performed a medical arbiter examination. (Ex. 28). He found reduced ranges of motion in claimant's lumbar spine, including 40 degrees flexion and 5 degrees extension. (Ex. 28-4). In addition, he opined that claimant was significantly restricted in the repetitive use of his lumbar spine. (*Id.*) Dr. Kane concluded that 30 percent of claimant's impairment was due to the accepted conditions and 70 percent was due to preexisting degenerative disc disease and lumbar facet arthritis. (Ex. 28-5).

In August 2014, an Order on Reconsideration modified the Notice of Closure and increased claimant's total whole person permanent impairment award from 2 to 5 percent. (Ex. 29-3). Based on Dr. Kane's findings, the reconsideration order determined that claimant's total impairment was 15 percent (10 percent range of motion loss and 5 percent chronic condition impairment). (Ex. 29-2); *see* OAR 436-035-0360(8), (9), (11); OAR 436-035-0019(1); OAR 436-035-0011(6). However, because Dr. Kane had opined that 30 percent of claimant's impairment was due to the accepted conditions and 70 percent was due to preexisting conditions, the Order on Reconsideration apportioned claimant's impairment (at 30 percent) for a total award of 5 percent whole person permanent impairment.<sup>2</sup> (Ex. 29-3). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ affirmed the Order on Reconsideration that awarded 5 percent whole person permanent impairment for claimant's accepted low back conditions.

On review, the Board adopted and affirmed the ALJ's order.

The court reversed and remanded to the Board in light of *Caren v. Providence Health Sys. Or.*, 365 Or 466 (2019), *Robinette v. SAIF*, 369 Or 767 (2022), and *Johnson v. SAIF*, 369 Or 579 (2022).

On remand, we find that claimant is entitled to the full measure of his total impairment (15 percent whole person permanent impairment), without apportionment. We reason as follows.

Claimant has the burden of establishing the nature and extent of his disability. *See* ORS 656.266(1). As the party challenging the Order on Reconsideration, claimant must establish error in the reconsideration process. *See* ORS 656.283(6); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000).

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<sup>2</sup> The Order on Reconsideration's 5 percent total whole person permanent impairment award included the 2 percent permanent impairment already awarded by the Notice of Closure. (Ex. 29-3).

Where, as here, a medical arbiter is used, impairment is established based on the medical arbiter's findings, except where a preponderance of the medical evidence demonstrates that different findings by the attending physician, or impairment findings with which the attending physician has concurred, are more accurate and should be used. *See* OAR 436-035-0007(5); *SAIF v. Owens*, 247 Or App 402, 414-15 (2011), *recons*, 248 Or App 746 (2012). Only findings of impairment that are permanent and caused by the accepted conditions or direct medical sequela of the accepted conditions may be used to rate impairment. *See* OAR 436-035-0006(1); OAR 436-035-0007(1); OAR 436-035-0013(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130-31 (1994). If a worker's impairment is due in material part to the compensable injury, the worker is entitled to the full measure of the total impairment, without apportionment, including that portion attributed to noncompensable conditions. *See Johnson*, 369 Or at 603.

Here, Dr. Kane found reduced ranges of motion in claimant's lumbar spine.<sup>3</sup> (Ex. 28-4). In addition, he opined that claimant was significantly restricted in the repetitive use of his lumbar spine. (*Id.*) Further, Dr. Kane concluded that 30 percent of claimant's impairment was due to the accepted conditions and 70 percent was due to preexisting conditions. (Ex. 28-5). Under such circumstances, we find that claimant's impairment was due in material part to the compensable injury. *See Johnson*, 369 Or at 603. Consequently, claimant is entitled to the full measure of his impairment, without apportionment, including that portion attributed to the noncompensable, preexisting conditions.<sup>4</sup> *See Johnson*, 369 Or at 603.

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<sup>3</sup> The parties do not dispute that Dr. Kane's findings should be used to rate claimant's impairment.

<sup>4</sup> In reaching the above conclusion, we note that *Caren* does not apply because the record does not establish the existence of a combined condition. *See Johnson*, 369 Or at 588 (*Caren* analysis inapplicable where the record did not establish the existence of a combined condition). Nevertheless, even if the record established a combined condition, apportionment would not be appropriate in this case because the record lacks a combined condition denial. *See Caren*, 365 Or at 487 (in combined condition cases where the record lacks a combined condition denial, a carrier must pay the full measure of the worker's permanent impairment if the impairment was caused in material part by the compensable injury).

We also distinguish *Robinette*. In that case, although the claimant had received an impairment award for a surgery and a chronic condition finding, he was not entitled to an additional impairment award for range of motion and stability loss findings because a medical arbiter opined that these findings were due entirely to preexisting conditions. *Robinette*, 369 Or at 772. Noting that the claimant must establish a causal connection between the compensable injury and each distinct loss of use or function, the court held that the record did not establish that the range of motion finding or stability finding was caused in material part by the compensable injury. *Id.* at 782-83. Here, unlike in *Robinette*, Dr. Kane

Accordingly, claimant has established error in the reconsideration process that apportioned his permanent impairment. *See Johnson*, 369 Or at 603; *Callow*, 171 Or App at 183-84. Therefore, we modify the Order on Reconsideration's and ALJ's awards as follows.

Based on Dr. Kane's lumbar range of motion findings (40 degrees flexion and 5 degrees extension), claimant receives the following spinal range of motion loss values: 4 percent flexion and 6 percent extension, totaling 10 percent. (Ex. 28-4); *see* OAR 436-035-0360(8), (9), (11).<sup>5</sup> Further, claimant receives a 5 percent chronic condition impairment value because Dr. Kane opined that claimant was significantly restricted in the repetitive use of his lumbar spine. (Ex. 28-4); *see* OAR 436-035-0019(1). Thus, claimant's total impairment is 15 percent. *See* OAR 436-035-0011(6).

Accordingly, on remand, in lieu of the Board's February 9, 2016, order, the ALJ's order dated September 2, 2015, is modified. In addition to the 5 percent whole person permanent impairment awarded by the Order on Reconsideration and affirmed by the ALJ's order, claimant is awarded 10 percent whole person impairment, for a total award of 15 percent whole person impairment. For services at the hearing level, on Board review, before the court, and on remand, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order (*i.e.*, the additional 10 percent whole person permanent impairment).

### **IT IS SO ORDERED.**

Entered at Salem, Oregon on June 7, 2023

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did not distinguish between impairment findings when he opined that 30 percent of claimant's impairment was due to the accepted conditions. (Ex. 28-5). Under such circumstances, we find that the record establishes that each loss of use or function (range of motion and chronic condition) was caused in material part by the compensable injury. (Ex. 28-4-5).

<sup>5</sup> Because the claim was closed on April 10, 2014, the applicable standards are found in Workers' Compensation Division (WCD) Admin. Order 12-061 (eff. January 1, 2013). (Ex. 21); *see* OAR 436-035-0003(1).